In the

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 178

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

UNITED INSURANCE COMPANY OF AMERICA, et al.,
Respondents.

No. 179

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION OF AMERICAN RETAIL FEDERATION TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

AND

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION

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Comes now the American Retail Federation (hereinafter called the "Federation") by its attorneys, Philip C. Lederer, Shayle P. Fox and Lawrence M. Cohen, and

respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus curiae,* supporting the position of Appellee and urging affirmance of the decision of the United States Court of Appeals for the Seventh Circuit herein, in these cases for the following reasons:

1. The Federation is an organization composed of 73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. The Federation's interest is based on the potential broad and far-reaching effect, attributed to the instant cases by Appellants in their petitions for *certiorari* herein, on these retail establishments, which threatens to disrupt settled patterns of marketing, distribution and independent contractor relationships in the retail field.

2. The experience of the retail establishments, whose interest the Federation seeks to represent herein, in interpreting the terms "employee" and "independent contractor" under Section 2(3) of the National Labor Relations Act and other statutes has been wide-spread and considerable and such experience includes numerous litigated matters with respect to this issue before the National Labor Relations Board, other federal and state agencies and the courts.

3. While the Federation has confidence in the ability of counsel for the Appellee to argue fully

and fairly the implications of the issues involved in the instant proceeding, especially as they relate to the particular dispute between a single employer and a union which is before the Court, the Federation believes that its unique experience may be useful to the Court in exploring the dimensions of the issues raised by these cases. In its *amicus* brief, if permission to file such a brief is granted, the Federation will delineate the potential effect of the Appellants' position on the various means of marketing and distribution and the manifold types of independent contractor relationships which are utilized in the retail industry today.

4. Counsel for all parties have been requested to consent to the Federation's filing a brief as *amicus curiae,* and the Applicant has been advised by Counsel for the Appellee that it declines to grant such consent on the basis that ". . . we resist the argument of the Government to the effect that the issue in this case is of sweeping importance and that the decision of the issue will be applied broadly to numerous trades and occupations. . . . United's case should be decided on its own facts and . . . a proper decision in United's case would not affect any other company."[1] The Federation believes, however, that the Court's granting *certiorari* to these proceedings suggests that the Court may regard these cases, as has been true of past Court cases with respect to this

[1] Letter from Counsel for Respondent to Counsel for the Applicant dated December 8, 1967.

issue,[2] as affecting business relationships other than that of United and its debit agents and as even affecting "numerous trades and occupations" apart from the insurance field.

5. Because of the potential effect on the significant present and future relationships utilized by retail business establishments represented by the Federation as well as because of the Federation's experience and knowledge of patterns of marketing, distribution and independent contractor relationships in the retail field, the Federation's ex-

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[2] Thus, while this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), was narrowly concerned only with the question of whether certain Los Angeles newsboys were "employees" under the National Labor Relations Act, its decision later proved significant with respect to such diverse cases as, for example, those involving the status of driver-loaders of coal trucks under the Social Security Act (*United States* v. *Silk*, 331 U.S. 704 (1946)), slaughter house boners under the Fair Labor Standards Act (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947)), and the infinite variety of factual situations that arise under the state unemployment compensation laws (see Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale L. J. 76 (1946)). The potential impact of any decision in this area is vast and far-reaching; one commentator in 1953 estimated that "there is no less than seventy-five federal and [Illinois] state statutes under which it is primarily necessary to ascertain whether an affected person is an employee or an independent contractor." Jacobs, *Are "Independent Contractors" Really Independent?*; 3 De Paul L. Rev. 23 (1953). In addition, of course, the decision may also substantially affect a variety of different relationships in their coverage under the National Labor Relations Act. See, e.g., the impact of the instant cases on the Board and Court of Appeals decisions in *Frito-Lay, Inc.* v. *National Labor Relations Board*, —— F.2d —— (7th Cir. November 7, 1967), denying enforcement, 161 NLRB No. 90.

perience and views may be of significant aid to the Court and may not otherwise be presented in the arguments of the parties.[3] If permission is granted to file a brief as *amicus curiae*, it will be short and relevant, so that the Court's time will not be misspent.

Respectfully submitted,

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[3] See, e.g., *United States* v. *White Motor Company*, 372 U.S. 253, 263 (1963), where in remanding a case involving territorial restrictions in manufacturer-retailer franchises, this Court stated that the territorial limitations "may or may not have that purpose or effect of stifling competition. We don't know enough of the economic and business stuff out of which these arrangements emerge to be certain."

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BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereinafter referred to as the "Federation") is an organization composed of

73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry.

The National Labor Relations Board (hereinafter referred to as the "Board") and the Insurance Workers' International Union, AFL-CIO (hereinafter referred to as the "Union") have each stressed to this Court that the impact of the instant cases extends far beyond the particular United Insurance Company of America (hereinafter referred to as "United") debit agents involved herein. (Board Petition for Certiorari, pp. 12, 13; Union Petition for Certiorari, p. 11.) This contention is at least historically correct: decisions of this Court with respect to the issue of independent contractorship have in the past significantly affected business relationships and long-standing methods of operation governed by statutes far removed from the narrow labor dispute that was actually determined.[1] Accordingly, while the questions now pre-

[1] Thus, while this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), was narrowly concerned only with the question of whether certain Los Angeles newsboys were "employees" under the National Labor Relations Act (hereinafter referred to as the "Act"), its decision later proved significant with respect to such diverse cases as, for example, those involving the status of driver-loaders of coal trucks under the Social Security Act (*United States* v. *Silk*, 331 U.S. 704 (1946)), slaughter house boners under the Fair Labor Standards Act (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947), and the infinite variety of factual situations that arise under the state unemployment compensation laws (see Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale L. J. 76 (1946)). The potential impact of any decision in this area is vast and far-reaching; one commentator in 1953

sented to the Court are framed in limited terms and may be so interpreted by the Court, any decision in these cases may, on the other hand, have far-reaching consequences for the entire retail industry.[2]

The concern of the Federation is that the Court, in formulating the legal principles to resolve the broader issues in the instant controversy, should be aware of the manifold permutations of horizontal and vertical relationships of a voluntary, quasi-integrated nature that exist in the retail industry today. Such relationships have rapidly evolved in recent years into an important and dynamic force in the American retail field; any decision which curtails the right of United to choose "to operate

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[1] (Continued)
estimated that "there is no less than seventy-five federal and [Illinois] state statutes under which it is primarily necessary to ascertain whether an affected person is an employee or an independent contractor." Jacobs, *Are "Independent Contractors" Really Independent?*; 3 De Paul L. Rev. 23 (1953). In addition, of course, the decision may also substantially affect a variety of different relationships in their coverage under the Act. See, e.g., the impact of the instant cases on the Board and Court of Appeals decisions in *Frito-Lay, Inc.* v. *National Labor Relations Board,* —— F.2d —— (7th Cir. November 7, 1967), denying enforcement, 161 NLRB No. 90.

[2] The *amicus* concurs with United's contention that "the employee or independent contractor status of a particular group of workers can only be determined, under the law, on a case by case, and not on an industry by industry, basis." United Brief in Opposition, p. 14. In view, however, of the broad potential impact of the Court's decision, as discussed in the preceding footnote, the *amicus* submits that if the Court intends that its decision should be so restricted, such a result can only be accomplished by a caveat expressly limiting the decision to the particular factual situation and particular statute involved herein.

its business on the basis that its agents are independent contractors" *(United Insurance Co. of America* v. *NLRB,* 304 F.2d 86, 91 (7th Cir. 1962)) may, therefore, have a substantial impact on the choice of Federation members as to their own operational methods.

SUMMARY OF ARGUMENT

The purpose of this brief is to discuss the characteristics which we believe may be found common to the debit agent operation of United and the similar type of relationships employed by retail business establishments, represented by the Federation, and to present the Court with the retail industry-wide point of view on these broader ramifications of the instant cases. The thesis of the brief may be summarized thus: the clear Congressional intent in determining that individuals "having the status of an independent contractor" are not "employees" under the National Labor Relations Act, 29 U.S.C. 151, *et seq.* (hereinafter referred to as the "Act"), was to specifically exclude all persons not embraced by the latter term under the general principles of the law of agency, and to require the Board to adopt the ordinary, present-day usage of the terms. The Board, as a result, has been mandated by Congress to take particular cognizance of the present day business realities involved in the delegation of separable business functions to contractors. The court below properly concluded that the Board had failed to reflect Congressional intent in the instant cases. It correctly found, in light of these realities, that the United debit agents were independent contractors under the Act.

ARGUMENT

I.

CONGRESS INTENDED THAT THE TERM "INDEPENDENT CONTRACTOR" IS TO BE DEFINED BY THE GENERAL PRINCIPLES OF THE LAW OF AGENCY AND THAT THE BOARD IS TO ADOPT THE ORDINARY, PRESENT-DAY USAGE OF THAT TERM.

Prior to 1947, there was considerable dispute as to precisely what Congress had intended when it used the undefined term "employee" in the Act. The Board's position, eventually affirmed by this Court in the *Hearst* case,[3] was that "where the persons involved function in a realistic economic sense as employees of an industrial enterprise Congress intended them to be within the Act"; the opposite view, as stated by the Ninth Circuit, was that "Congress intended to use the terms 'employer' and 'employee' . . . in their ordinary and conventional sense as understood at the time the statute was enacted . . . there is no delegation to an administrative body of power to determine whether the facts are within a specified exception to a statute, the exercise of which power involves an interpretation of terms." *Hearst Publications, Inc.* v. *National Labor Relations Board,* 136 F. 2d 608, 611-612 (9th Cir. 1943).

This controversy finally was resolved by Congress when it enacted the Taft-Hartley amendments to the Act. The term "employee", Congress made it clear, had been improperly interpreted by the Board and the Court:

> An "employee", according to all standard dictionaries, according to the law as the courts have stated it,

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[3] *National Labor Relations Board* v. *Hearst Publications, Inc., supra* note 1.

> and according to the understanding of almost everyone, with the exception of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications* (322 U.S. 111 (1944)), the Board expanded the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying on the theoretic "expertness" of the Board, upheld the Board. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wishes. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee". (H. Rep. No. 245, 80th Cong. 1st Sess. 18 (1947); 1 Leg. Hist. of the Labor Management Relations Act (G.P.O. 1948) (hereafter referred to as "Leg. Hist."), 309).

The correct view, according to Congress, was that of the Ninth Circuit. As Senator Taft stated in summarizing the principal differences between the conference agreement and the bill which the Senate passed:

> "The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of law of agency." (Cong. Rec., Senate, June 5, 1947; 2 Leg. Hist., 1537) (emphasis supplied).

Although Appellants pay lip service to this Congressional intent in their respective briefs, in effect they choose to disregard the *raison d'etre* of the amendment. The Board thus states that "the subsequent infusion of

flexibility into the relevant standards for determining employment status is especially appropriate where the purpose of the inquiry is not to decide the applicability of *respondeat superior* liability, but to determine the coverage of the National Labor Relations Act" and that "the determination whether an individual is an employee or an independent contractor thus allows considerable room for the exercise of Board judgment and discretion . . ." (Brief for Board, pps. 17, 19). The Union's argument is similar. (Brief for Union, p. 52).

The *amicus* believes that such contentions are at the heart of the Appellants' mistaken approach in these cases —an approach which, in short, is precisely that which Congress rejected in 1947. The issue of independent contractorship is not, as the Board argues, a matter of administrative expertise with "considerable room" for the exercise of Board discretion. It is, instead, "always" a legal question to be governed by established common-law rather than any specialized statutory standards. The issue is one that is well within the judgment and experience of a reviewing court.

II.

THE COURT BELOW TOOK PROPER COGNIZANCE OF THE PRESENT DAY BUSINESS REALITIES INVOLVED IN THE DELEGATION OF SEPARATE BUSINESS FUNCTIONS TO CONTRACTORS.

A. THE CRITICAL TEST OF INDEPENDENT CONTRACTORSHIP.

Any attempt to define the independent contractor relationship under common law agency principles, as illuminated by the "ordinary and conventional" usage of the modern business world, admittedly does not lend itself

to "some simple uniform and easily acceptable test."[4] The court below, nevertheless, could, without dispute, state that "the critical test" is the "right to control the manner and means by which the agent conducts his business", the same test as that which this Court in *Hearst* indicated had evolved 'for deciding whether one who hires another is responsible in tort for his wrongdoing."[5]

The controversy lies in determining when the requisite control by the principal of the details of the agent's performance is present. More specifically, it involves the relative values to be accorded each of the Restatement criteria[6] giving full consideration to the methods of doing business today.[7] It is the purpose of this effort, as *amicus,*

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[4] *National Labor Relations Board* v. *Hearst Publications, Inc., supra* note 1.

[5] See, also, e.g., *NLRB* v. *Nu-Car Carriers, Inc.,* 189 F. 2d 756 (3rd Cir. 1951) and *Radio City Music Hall* v. *United States,* 135 F. 2d 715, 717 (2nd Cir. 1943). In the latter case, Judge Learned Hand proclaimed, "The test lies in the degree to which the principal may intervene to control the *details* of the agent's performance; and that in the end is all that can be said . . ." (Italicized in the original). The Restatement similarly places the control test at the head of its list of determining factors in determining independent contractorship, stating it to be "(a) the extent of control which, by the agreement, the master may exercise over the details of the work." (Restatement of the Law of Agency 2d, § 220(2) (1958) (hereafter referred to as "Restatement")).

[6] Both Appellants accept these criteria as establishing, in general, the tests for determining the relationship.

[7] For example, in both the present case and the previous United debit agent decisions *(United Insurance Company of America,* 120 NLRB 911; *United Insurance Company of America,* 132 NLRB 885), the Board rejected proferred evidence that, in addition to debit agents, the sales function of United had also been delegated to general insurance agencies, admittedly not "employees" of United, who operated under the same "controls" as those maintained in the case of debit agents.

to collimate the attention of the Court on presently existing business realities, particularly in the retail industry, before discussing such relative values and applying the criteria to the facts in this case.

B. THE PRESENT BUSINESS REALITIES OF THE INDEPENDENT CONTRACTORSHIP RELATIONSHIP.

A cogent example of the necessity for a dynamic assessment of the traditional standards is presented by the Union's citation of *The Singer Manufacturing Company* v. *Rahn,* 132 U.S. 518 (1889). This Court was there called upon to determine the status of a salesman who drove his horse and wagon over a route directed by his principal. The simplicity of the Singer Company salesman's operation, when contrasted to the complex operation of the United debit agent, is due not as much to the contractual intent of the parties as to the evolution in the business world.

Competition to meet customers' exacting demands for a wide selection of goods and extensive services has imposed upon every retailer the imperative of specialized attention to each phase of its business. A "new breed" of specialists has become necessary to assure efficiency in every link of the chain of distribution of goods and services from production to consumption. Few companies can economically possess such specialists; independent

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[7] (Continued)
This significant omission is the result, no doubt, of the Board's refusal to properly consider the general agency principles mandated by Congress and its concomitant refusal to look to contemporary established business practices to determine whether the "controls" exercised in a given case bring the relationship involved within the ambit of the Act.

contractors, therefore, have become a necessary and integral component in numerous significant functions heretofore usually considered to be a part of the business of the principal.

In *United States* v. *Silk*, 331 U.S. 704, 714 (1946), this Court recognized that "few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors." In the twenty-one years which have elapsed since that pronouncement, the broad categories of production, manufacturing and distribution have proliferated into numerous subdivisions, many growing into large separate industries. Business arrangements which were unusual or unknown in that day now have become commonplace. Today, the services of independent contractors, each with their own distinct occupation and specialized expertise, are available for performing almost every distinct function in all areas of the business world.

Particularly in the retail industry, the relatively small entrepreneurs have maintained their existence solely by virtue of the availability of these necessary specialty services through contract arrangements. Specialists have made merchandise available to the smaller retailer, and sales available to the smaller manufacturer, at a cost and investment which enables them to compete with the giant corporate structures that have evolved in the industry. To deal with manufacturers in obtaining goods for the retailer, there are contractors performing as purchasing agents, jobbers, brokers, cooperatives, franchisors, licensors and others. To sell the manufacturers' goods to the consumer, there are contractors performing as sales agencies, brokers, franchised or licensed dealers, conces-

sionaires and leased departments within a retail establishment and others. Consumer credit, which the smaller retailer may not be able to afford to provide, can be arranged for customers by contracts with banks or other lending institutions. Local cartage firms will contract to handle delivery to customers of the smaller stores which cannot afford their own trucks and drivers. Installation and repair firms will contract to undertake the service warranties required of even the smallest retailers. Independent advertising agencies can provide the talent and skill which the small retailer cannot economically maintain as part of his own organization. Market research firms are available to advise the retailers as to taking on new lines and effectively pricing goods for sale. Further, contractors will maintain their premises, repair their fixtures and equipment, arrange their window displays, guard their premises and transport their money amongst other necessary services available to the smaller retailer. Even the corporate giants in the retail field may utilize some or all of these contractors in order to obtain the expertise which they are unable, satisfactorily or economically, to provide through their own organization.

Viewed from the other side of the coin, the various specialties discussed above not only enable smaller merchants to survive, they also provide business opportunities for the entrepreneurs willing and able to provide such services to retailers. The evolution of corporate giants in the retail field, therefore, has not obviated the need for the small business entrepreneur but, instead, has created entire new markets for his services.

This Court's statement in *Silk*, was thus more than an accurate observation of that date. It was a prophesy of economic development, particularly in the retail industry. This phenomenon of voluntary cooperation be-

tween retailer and contractor, sometimes referred to as quasi-integration,[8] has taken varied forms as numerous as the myriad products and services provided thereunder.[9] Retailer-cooperative voluntary groups,[10] wholesaler-sponsored voluntary chains,[11] voluntary affiliates of corporate chains,[12] and franchised retail outlets[13] are general cate-

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[8] Beckman & Davidson, *Marketing,* 293-297 (8th Ed. 1967)

[9] These arrangements vary from small groups of minimal investment neighborhood establishments (such as custard drive-ins and "Ma and Pa" retailers) to associations of hundreds of substantial enterprises circling the world (such as discount chains with leased departments and concessions).

[10] "Retailer-cooperative voluntary group" describes retail store owners combining to establish their own wholesale house. Independent co-operative groceries are good examples.

[11] "Wholesaler-sponsored voluntary chain" describes a distributor licensing store owners in the use of its name and sources of merchandise. Examples cited in Beckman & Davidson, *Marketing, supra* at *note* 8, are McDonald Drive-Ins and IGA (Independent Grocers Alliance) Food Stores.

[12] "Voluntary affiliates of a corporate chain" describes a license arrangement by which a local, privately owned store can operate as a member of a large chain. Examples cited in Beckman & Davidson, *Marketing, supra* at note 8, are Western Auto Associate stores and Walgreen Drug Agency stores.

[13] "Franchising" is a general term including any agreement between one who manufactures, processes or distributes goods (or directs services) and another who is granted the right to sell and distribute. As Senator Philip A. Hart recently stated in a hearing before the Anti-Trust and Monopoly Subcommittee of the Senate Judiciary Committee concerning Senate Bills S. 2321 and S. 2507: "We know that franchising has assumed an important role in the distribution of goods in the market place. Indeed, franchising accounts for 10 percent of the gross national product and 25 percent of all retail sales. Today, 400,000 businessmen are franchisers." (Statistics cited in Section 2(a) of S. 2507, 90th Cong., 1st Session)

gories of these cooperative arrangements. In each case, the participants are principals who have contracted out a function—whether it be buying,[14] retailing[15] or service[16] —that they have decided cannot be efficiently or economically performed by themselves.

In determining the status of the United debit agent, the Court should take cognizance of the effect of its decision on these special business relationships in the retail industry. These newly evolved patterns of business create a niche for small entrepreneurs in today's economy. The impact of the decision in this case could be disruptive to these patterns and deprive many small business men of their entrepreneurial opportunities.

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[14] Thus, buying has been contracted out in the retailer-cooperative voluntary group and wholesaler-sponsored voluntary chains to enable the retailer to obtain quantity discounts on prices, to have specialized people performing purchasing, to reduce delivery costs by arranging car load shipments and to provide a large, readily available inventory without investments of capital beyond the means of individual participants.

[15] Examples of contracting out the retail function are found in the voluntary affiliates of corporate chains and franchised retail outlet categories. These arrangements enable the chain operator, the manufacturer or the owner of a process or idea, to provide himself with distribution to consumers by delegating the responsibility for the operation of the retail outlet. By delegation, he may obtain capable operators known in the community, possessing knowledge of special local conditions, thus allowing him to operate at a greater volume with a minimum capital investment.

[16] For example, the functions performed by advertising agencies, credit institutions, market surveyors, public relations firms, security agents *(Bowman* v. *Pace Co.* 119 F. 2d 858 (5th Cir. 1941)) and others of the same genre.

C. THE EFFECT OF PRESENT BUSINESS REALITIES ON GENERAL AGENCY PRINCIPLES: CERTAIN INDICIA ARE NO LONGER APPLICABLE.

The multiple variations that quasi-integration has taken in today's business world materially affects the definition of independent contractor. This effect is a negative, as well as a positive one; it discloses not only what is of significance in defining an independent contractor but also what is irrelevant and misleading.

It is irrelevant and misleading, for example, to approach the issue of independent contractor from the standpoint of the principal, comparing those functions he has delegated with those he has chosen to retain.[17] It is also of no value to inquire whether the principal has retained some of the same functions he has chosen to delegate.[18]

The above approaches determine the issue of independent contractorship by looking through the wrong end of the glass. The only relevant inquiry is from the standpoint of the contractor and to examine only that special part of the principal's business for which the contract was let. It is of no regard whether that same part of the business or a similar part has been or is also contracted to others or retained by the principal. It is also of no regard how small

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[17] In the instant case, United has chosen to contract only its sales and premium collections functions to debit agents. The retention by United of other functions such as underwriting or risk selection, pricing, terms of policies offered and other aspects of the insurance business cannot, therefore, be considered as any reservation of control over the details of the debit agent's performance.

[18] If United had chosen to supplement independent agencies with its own employees, obviously this factor would not make the agencies any less independent.

the part may be when compared with the breadth of the principal's entire operation. It is only important to review, from the contractor's point of view, the restrictions placed on the contractor's ability to perform independently his special assigned task. Restrictions or limitations as to other functions which the principal has chosen to be performed by himself are immaterial.[19]

Similarly, while the degree of principal-contractor assistance has been given weight in consideration of the relationship, technical assistance and supervision must be distinguished. The mutual best interests of both the principal and the contractor are clearly served by following the course most likely to achieve the desired results. The principal, naturally, should and will do whatever is feasible to assist the contractor in successfully fulfilling his delegated role. The principal may prepare and issue "how to do it" literature and other publications for the use of the contractor which set forth in minute detail how the task contracted can best be performed. There may also be regular, comprehensive training sessions, instructions and professional assistance by the principal at the

[19] In the retail field, for example, functions retained by the principal in the delegation to contractors are common, often including reservations with respect to product selection (as, e.g., the restriction on selling competitive products prevalent in the automobile, shoe, gasoline station and soft drink bottling industries), merchandise pricing (as, e.g., the obligation to conform to the principal's price dictates prevalent in the food, drug and shoe industries), credit (as, e.g., the gasoline industry), merchandise buying and the territory to be served. Moreover, the contractor will also have no authority or responsibility with respect to the actual product itself. The debit agent thus must sell the insurance policy United will issue, the auto dealer must sell the car that comes out of the factory; neither indicates that the contractor is any less independent.

commencement of the contractorship and at frequent intervals thereafter, periodic inspections by the principal, advertising and promotion assistance, investigation of complaints by the principal, and so on.[20] None of these types of mutually beneficial assistance are intended to, or function, as "controls" over the *details* of the agent's performance. Rather, they are used solely to insure the successful *results* of the co-operative endeavor.

The principal may also impose "controls" over the conduct of the contractor to protect his name, reputation and property. It would be wholly unreasonable to expect that a principal would leave such valuable assets to the unfettered discretion of the contractor. Thus, the principal may require the contractor to protect and preserve property in his control,[21] to operate according to specified health, safety and moral standards,[22] or to provide designated customer services.

The principal may also desire, as in the case of United, that the contractor adhere to established reporting and accounting procedures; this may be a requirement of standardized or electronic data processing, uniform accounting policies, or remittance "controls" in cases where the contractor has funds of the principal, and, particularly, where the contractor may deduct his remunera-

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[20] See, e.g., Hall, *Franchising—New Scope for an Old Technique,* Harv. Bus. Rev., Jan.-Feb. 1964, 63; Kursh, *The Franchise Boom* (1962).

[21] See, e.g., *Glenn* v. *Standard Oil Co.,* 148 F.2d 51 (6th Cir. 1945).

[22] E.g., cleanliness standards in gasoline service stations or quality and hygiene standards in food franchise operations.

tion directly from receipts.[23] Such requirements relating to the time and nature of performance are often, as in the case of various independent tradesmen, the essential ingredient of the result desired. "Controls" of this nature do not properly militate against the independent contractor status. The critical factor is whether the physical details of performance are left to the skill and judgment of the contractor; the regulation of mere incidentals required by business needs is extraneous to any determination of his "independence".

D. THE EFFECT OF PRESENT BUSINESS REALITIES ON THE CRITERIA OF INDEPENDENCE: CONCEDEDLY APPLICABLE INDICIA MUST BE PROPERLY WEIGHED.

The "independence" of a contractor is determined by reviewing his relationship by each of the Restatement criteria. The relative values assigned these criteria, however, must reflect the practices and conventional usage prevalent in business today.

1. The Extent of Control Test.

The initial Restatement test is the extent of control which the principal may exercise over the details of the agent's work.[24] The significant word is "details"; as discussed above, a principal may exercise considerable "control" over the essence of the contractor's work and various matters coincident thereto without any significant effect on the independent judgment and skill required. Such "controls" do not accurately gauge independent contrac-

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[23] In the instant cases, similar reporting and remittance "controls" were imposed on both the debit agents and the independent agency of Garfinkel.

[24] Restatement, Section 220 (2) " . . . (a) the extent of control which, by the agreement, the master may exercise over the details of the work; . . ."

torship. It is the presence or absence of specifications as to "how" the results of the task delegated are to be achieved—the direction of the physical details of performance—that reflect the type of control envisaged by the Restatement. The United debit agent, under this test, is "on his own" in performing his occupation in the field and is required to use his personal ability and independent initiative. The court below properly concluded, therefore, that "controls" such as those imposed on the debit agent are

> ". . . consistent with an independent contractor status. They are not indicative of an existence or exercise of control directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors."

2. The "Distinct Occupation or Business" Test: the Occupation Involved and the Skill Required.

The need for contemporary review is perhaps greatest in the area of inquiry as to whether the agent is engaged in a "distinct occupation or business."[25] The technical

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[25] Although listed separately, the following Restatement, Section 220(2) tests are interrelated and should be discussed jointly:

> ". . . (b) whether or not one employed is engaged in a distinct occupation or business;
>
> "(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> "(d) the skill required in the particular occupation; . . ."

complexities of products and services and the high standards of performance required by competition have, as discussed above, created the need for skillful specialists in narrow subdivisions of the manufacturing, production and distribution functions. The hallmark of these specialists is their skill in performing their individual, unique function. It matters little whether such skill is acquired by means of instruction and training from the principal in an independent contractor relationship, or whether it is the result of inherent ability or prior experience.[26] It is similarly irrelevant to determine whether the specialist utilizes these skills on behalf of one principal or several. The only significant fact is the degree of skill involved during the performance of the specialist: the greater the skill, the more likelihood that the specialty is a distinct occupation of business.[27]

Measured by the above guidelines, the skill required of the United debit agent is apparent. The separate phases of his occupation—selling, collecting and servicing—are all indispensable to the retail process. They each require distinct skills. In today's complex business world, more than humble ability is required to succeed in any of these three fields of endeavor.

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[26] The Board and Union incorrectly place great emphasis upon the fact that no prior insurance experience is required for the engagement of debit agents by United. This position imposes a test of special skill *before* engaging a contractor; the distinct occupation test, however, requires only that the contractor possess special skill *during* performance.

[27] Significantly, while the Board lists virtually all of the Restatement criteria as factors which must be assessed and weighed in determining independent contractorship, one of the most critical tests, the skill required, is omitted altogether. Brief for the Board, p. 18.

Salesmanship is a highly developed art in business today.[28] It is taught in commerce colleges as a requirement to the marketing degree. Further, the salesman is compelled to understand the oft-times complicated commodity he is offering.[29] Selling is conceded as one of the highest paying occupational groups in the entire economy.

The collection function also has become of great importance with the phenomenal growth of credit sales.[30] An infinite variety of products and services are now available to most people on credit. Commensurate with the growth of this form of retailing, collection has become a special skill practiced by both large corporate structures[31] and individual collection agents offering their services to one or more principals.

The third aspect of the debit agent's job, service,[32] has likewise become a vital factor in successful retailing

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[28] Reiser, *The Salesman Isn't Dead—He's Different,* 66 Fortune, pp. 124-127, 248, 252, 254, 259 (November, 1962) in Britt and Boyd, *Marketing Management and Administrative Action,* pp. 589-600 (1963).

[29] Insurance salesmen must be masters of the art of selling. Insurance is only a contract right evidenced by a printed piece of paper. It can be used neither to feed, clothe or shelter the purchaser. It is difficult to apprise a potential customer of such a future need for which present payment is exacted. Success in this field requires a high degree of sales ability. Further, ordinary insurance is traditionally sold through specialized brokers and independent sales agents, as recognized by the court below.

[30] Katona, *The Integrated Approach to Product Planning,* 101 Market Services, New York: American Management Association, pp. 56-68 (1957).

[31] Credit agencies, such as Dun & Bradstreet and numerous commercial banks, for example, are active in the consumer credit collection field.

[32] The debit agent's customer, the policy holder, has purchased an esoteric contract right and frequently understands no more than the fact that, at his death, the

today.[33] In order to sell his products, the retailer must provide delivery and installation. This function frequently requires the combined technological skills of a plumber, electrician, mechanic, mason and carpenter. Similarly, in order to keep his product sold under the warranties which competition have dictated, repairs involving the use of the same, varied skills as installers must be supplied to the customer.[34] Retail service today, as a result, is performed by persons combining many skills, each of which traditionally constitutes a distinct occupation.

The United debit agent's function thus involves considerable skill. He is clearly a specialist in today's business world and engaged in a distinct occupation or business.

3. The Supply of Tools and Place of Work Test.

The Union has contended that in the instant case the Company "alone provides whatever instrumentalities and tools are required in the agents' work: the accumulated policy holders; the insurance policies; the sales promotion literature; the forms; the Rate Book."[35] Several sig-

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[32] (Continued)
face value of the policy will be paid his beneficiary. Policy holder questions can arise concerning optional settlement, loan possibilities, termination, and a host of other contractual privileges undoubtedly couched in complicated legal terminology in the insurance contract. It is the debit agent's duty to explain to the policy holder his rights and process his demands; to service, if you will, the product which has been sold.

[33] Twitchell, *Dealers Rely on Service to Build Future Sales,* Mart (January, 1967); Twitchell, *Better Service—Service Regulations Build Better TV Sales,* Mart (July, 1967).

[34] The demand for these combined skills today far exceeds the supply. See *Service Labor Summary,* 32 Home Appliance Building Magazine (July, 1967).

[35] Brief for Union, p. 62.

nificant fallacies lie in this overly-simplified view. The first error is that it misconstrues the "tools" which the agent must depend on for success.[36] The debit agent's job cannot be equated to that of a laborer working with a pick and shovel; his "tools" are considerably more subtle and sophisticated. In order to sell a policy, collect a premium or service an account, the debit agent, in addition to a high degree of skill, requires customers, considerable time, a mode of transportation and an effective "sales personality". These are the real tools of the trade, and in each case they are furnished solely by the agent himself and not United.[37] The type of "tools" which the Union has noted are, in fact, only forms of incidental or mutually-beneficial management assistance which, as discussed above, do not restrict the details of the agent's performance.[37a]

Secondly, the Union's approach involves only considerations of efficiency and financial arrangement. It would be the height of inefficiency, for example, to require the agent to prepare his own policies, forms, sales literature and rate books. In addition, while United could, perhaps,

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[36] The Restatement, Section 220(2) test is: ". . . (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; . . ."

[37] The only "tools and instrumentalities" referred to in the salesmen illustrations as to this test set forth in the Comment to Section 220(2) of the Restatement (p. 491) are the salesman's time, his automobile and the right to call on those whom he pleases. The Comment, significantly, concludes that even though a salesman "agrees to give full time to the work but furnishes his own car, is paid by commission and can call on those whom he pleases," it is inferred that the salesman is *not* a servant.

[37a] In the automobile and television distribution and service franchises, for example, detailed price lists and service manuals are made available to the franchisee who is clearly independent despite heavy reliance upon the manufacturer in this regard.

require the agent to provide his own office replete with stenographic help, files and office equipment to use on those infrequent occasions that the agent utilizes the district office, the effect of such a requirement could make little difference as to the remuneration of the agent,[38] and no difference at all as to the manner and means which he may choose to perform his assigned tasks.[39] Thus, whether necessary capital or capital assets of this nature are supplied by the principal, by the contractor, or by

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[38] As discussed in Hall, *supra* note 20 at 69-70 certain franchisors provide their dealers with stores, complete with inventory and fixtures, while other franchisors require their franchisees to provide their own stores. Some principals also offer financial assistance to the contractor through direct loans or by guaranteeing bank loans while others require the franchisee independently to provide his own capital. No matter which form the transaction takes, the financial arrangement must include an interest factor for a return on invested capital to the party supplying the capital on the one hand and interest on borrowed money to be paid on the other hand. In either case, the return to one or cost to the other then becomes a factor in determining profit and will directly influence the contractor's commission arrangement.

[39] Moreover, the district office's function in the instant case is more than just a matter of providing the agent with needed physical assets. It is also a convenient means of auditing results of the agent's performance. By having a central location for agents to report and store their records, United is more efficiently and more economically able to obtain current information as to the agent's performance. Similarly, for example, delivery, installation and service contractors in the retail industry frequently report to a central office supplied by the principal. The decision is predicated upon considerations of efficiency and economics and not upon the degree of desired independence.

an outside source should not influence the decision as to the contractor's degree of independence.[40]

4. The Length of Employment Test.

The Restatement, Section 220(2), also lists as a criterion ". . . (f) the length of time for which the person is employed; . . .". This test is of little significance, however, where a continuous need, rather than a single accomplishment, is desired. In the retail industry, for example, many delivery installation and service contractors, whose continuous performance satisfies a constant requirement of the principal, continue to perform virtually exclusively[41] for that principal as long as they produce the desired results.[42]

This type of relationship is no different from a choice by any businessman to purchase continually from a satisfactory source of supply or to sell continuously to a good customer. The contractor is also satisfied as long as the prin-

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[40] See the discussion of the independent contracting of plant maintenance work in *Fibreboard Paper Products Co.* v. *National Labor Relations Board,* 379 U.S. 203 (1964), where at page 213, this Court stated:

> "The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an individual contractor to do the same work under similar conditions of employment.".

[41] Local delivery companies, ranging in size from single truck to multi-vehicle, are a good example.

[42] A contractor who determines that one principal can provide him with sufficient profit opportunity so that he excludes other contracts is no less independent that one who gets a small amount of work from many principals. In fact, the reasonable assurance of substantial work and income from one source might tend to make a contractor more independent than one who needs every job he can obtain and is willing to part with his independence in order to obtain work.

cipal continues to provide a relatively permanent source of satisfactory income.

United likewise has a continuous need for sales and collection of its insurance policies and as long as the debit agent produces results there would be no reason to terminate the relationship.[43] Similarly, as long as the debit agent is satisfied with his commission arrangement and the product of United that he sells, he will continue the established relationship.

5. The Method of Payment Test.

Incentive payments may be made to both employees or independent contractors without evidencing the nature of the relationship. Perhaps the only real distinction with regard to this test[44] is whether there is any limitation on the minimum and maximum that can be earned by the contractor and the actual disparity between different contractors' earnings.

Significantly, the debit agent is guaranteed no income and, in fact, may lose money if his transportation and promotional expenses exceed his commission income. On

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[43] While some courts have considered the right of the principal to terminate a relationship at will as circumstantial evidence of employee status, this test is invalid where there is a continuous need. In such case, an at-will relationship is no less significant of independence than if the contract cannot be terminated for a fixed period of time. Similarly, contracts of employment today are just as often as not written for a stated period of time during which they may not be terminated, particularly where skilled personnel are involved.

[44] The Restatement, Section 220(2) test is described as ". . . (g) the method of payment, whether by the time or by the job; . . .".

the other hand, if the agent is efficient, economical[45] and successful, his income could be virtually unlimited. The actual disparity between the incomes of the debit agents involved in these cases—$7,000 to $20,000—reflects the payment by the job performed standard contemplated by the Restatement. The agents are clearly in a business of their own from which they can reap a substantial profit based on their own efforts.

6. The Belief of the Parties, the Regular Business of the Principal, the Principal in Business Tests.

It is axiomatic that an entrepreneur is in business to make a profit. Today he has a choice, in the management of his affairs, whether to achieve this result by his own individual efforts, to have certain business functions performed by employees or to contract out a portion of the endeavor to independent contractors. The contractor, no less a business entrepreneur than his principal, has decided to go into his own business, subjecting his income production to the vicissitudes of economic conditions and his own ability to exercise initiative and discretion.[46]

United has chosen to perform a portion of its sales function through independent contractors rather than its own employees. The debit agents have chosen to establish their own businesses to sell United's insurance rather than oper-

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[45] The agent, for example, has the power to employ assistants. It is his decision as to whether the additional income justifies the expense.

[46] The Restatement tests are:

"... (h) whether or not the work is a part of the regular business of the employer;

"(i) whether or not the parties believe they are creating the relation of master and servant; and

"(j) whether the principal is or is not in business."

ate as employees. The parties must remain free to make these fundamental choices. If "United has chosen to operate on the basis that its agents are independent contractors . . . it (has) the complete legal right so to do." *United Insurance Co. of America* v. *NLRB*, 304 F.2d 86, 91 (7th Cir. 1962).

III.

THE UNDESIRABLE INCIDENTS OF A RESTRICTED DEFINITION OF INDEPENDENT CONTRACTOR.

In assessing the broadly based and highly developed utilization of independent contractors in the contemporary retail field, an overall, composite conclusion is apparent: the increased reliance on the use of contractor-specialists by both large and small businessmen has resulted in a mutually-satisfactory and vital cooperative endeavor. The larger businesses have thus come to rely upon the expertise and skill of such contractors, particularly in new or economically uncertain areas of their operation. At the same time, the small retailer has been able to meet both increased consumer demands and larger, heavily integrated competition[47] by contracting to specialists those functions which he cannot either efficiently or profitably undertake himself. Concomitantly, other entrepreneurs, willing to risk their efforts and rely on their individual initiative and judgment for rewards beyond a pay check, have been provided with the opportunity to establish and engage in their own business by supplying these specialized functions to all sectors of the retail industry.[48]

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[47] Weiss, *The Shrinking Headquarters Target, Sales Management*, pp. 44-48 (July 6, 1963) in Britt & Boyd, Marketing Management and Administrative Action, p. 439 (1963).

[48] Hall, *"Franchising—New Scope for an Old Technique, supra* note 20; Kursh, *The Franchise Boom, supra* note 20.

This highly satisfactory solution to the increased complexities of retailing today should not be discouraged by imposing an employment relationship on intended self-employeds. Encompassing the debit agents, and others similarly legally situated, in an employment status would impose liability on the principal under *respondeat superior* as well as the multitude of federal and state statutes referred to earlier.[49] The inevitable consequence of such liability would be the need for the principal to exercise high degrees of control and supervision in order to protect himself, thereby eliminating the independence of the small contractor. The increased burdens of imposing and enforcing these controls, moreover, would eventually create a counter trend to have employees, rather than contractors, perform the requisite specialized functions; the former advantages of contractorship—cost, efficiency and consumer appeal—would become insignificant when weighed against the burdens of necessary control. In short, relegating such businessmen to the legal status of employees would be a diseconomy and detriment to the retailer and consumer alike. It would also result in a serious erosion of the entrepreneurial spirit and incentive which has traditionally been one of the hallmarks of the American economy.

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[49] Jacobs, *Are Independent Contractors Really Independent?" supra,* note 1.

CONCLUSION

The status of independent contractors is to be determined under the common law tests of agency. Congress has declared that the statutory term is to be defined with reference to its ordinary usage and contemporary business realities and is not to be governed by loose standards of administrative discretion. These were the criteria utilized by the court below.

The relationship of United and its debit agents, therefore, was properly found to be one of principal and independent contractor, and, accordingly, the decision of the court below should be affirmed.

Respectfully submitted,

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